IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 12, 2006

STATE OF TENNESSEE v. JAMES BERT MCPHERSON

Direct Appeal from the Criminal Court for Sumner County
No. CR-1056-2004, Jane W. Wheatcraft, Judge

No. M2006-00864-CCA-R3-CD - Filed April 12, 2007

The appellant, James Bert McPherson, pled guilty in the Sumner County Criminal Court to two counts of attempted sexual battery, a Class A misdemeanor. For each conviction, the appellant received a sentence of eleven months and twenty-nine days, to be served consecutively. On appeal, the appellant challenges the trial court's failure to grant probation. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

John Pellegrin, Gallatin, Tennessee, for the appellant, James Bert McPherson.

Robert E. Cooper, Jr., Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In December 2004, the appellant was indicted for three counts of sexual battery by an authority figure and one count of sexual battery. On September 7, 2005, the appellant pled guilty to two counts of attempted sexual battery with a sentence of eleven months and twenty-nine days for each count. The appellant acknowledged as a factual basis underlying the pleas, he "[t]ouched the girl on the breast and one on the butt." The plea agreement provided that the sentences would be served consecutively, but a sentencing hearing would be held to determine the manner of service of the sentences.

At the sentencing hearing, Detective Tim Bailey with the Sumner County Sheriff's Department testified that at the time of the offenses the appellant ran the New Deal Café. The victims, A.D. and A.R.,[1] worked for the appellant at different times. A.D., who was sixteen at the time of the offenses, told Detective Bailey that the appellant made inappropriate remarks to her and would go out of his way to touch her butt. Once, the appellant touched A.D. in the "bra strap area." A.D. told police that A.R. was also a victim of the appellant's advances. After A.D. reported the incidents of inappropriate touching, Detective Bailey arranged for her to make a "covert phone call" to the appellant. During the call, A.D. told the appellant that she was uncomfortable with the appellant touching her butt. The appellant promised A.D. that he would not touch her butt again. When speaking with police after the call, the appellant denied any wrongdoing. He could not explain to police why, during the call, he promised not to touch A.D. again. As an exhibit, the State submitted A.D.'s victim impact statement.

A.R. testified at the sentencing hearing that she was seventeen years old when she began to work for the appellant at the New Deal Café. She worked at the restaurant only three days. She said that the restaurant had "a small, kind of family-type atmosphere." The restaurant was closed for remodeling on A.R.'s first day of work. The appellant told her that on the first day the restaurant reopened for business, A.R. was to wear a uniform of black pants or a black miniskirt, a black bra, a white tank top, and high-heel shoes such as pumps or stilettos. A.R. felt the appellant's instructions were very strange.

A.R. initially thought the appellant was "just kind of flirty." However, his behavior made her increasingly uncomfortable. For example, on her first day of work during the remodeling, the appellant put his arm around A.R. and told the painters that she was his girlfriend "Brittany." The second day A.R. worked, the restaurant was open for business. A.R. leaned over to wash dishes, and the appellant touched her butt. A.R. told the appellant not to touch her. On A.R.'s third and final day of work, she was carrying trays when she heard a noise. A.R. turned to find where the noise originated. The appellant pulled down her pants, exposing her underwear and humiliating her. Additionally, A.R. recalled that on one occasion the appellant came up behind her and grabbed her. On another occasion, A.R. spilled food on the front of her shirt, and the appellant "made a comment about licking it off."

A.R. was shocked by the appellant's behavior because the local area was filled with "really big Christians." At the end of her third day of work, A.R. went to the restaurant and told the appellant that she was quitting the job. A.R. denied accusing the appellant of inappropriate behavior in order to sue him for money, explaining that "money ain't even an object with me."

The appellant testified that he was sixty-four years old and was currently living with his wife in a retirement park in Florida. The appellant said that he and his wife had been married for forty-five years. He stated that while in Florida he engaged in sales relating to aluminum work, but his work had slowed due to health problems. The appellant asserted that he suffered from

[1] It is the policy of this court to refer to minor victims of sexual crimes only by their initials.

cardiovascular disease and, as a result, had several heart attacks. The most recent heart attack was within the year prior to the sentencing hearing, and, three weeks prior to the sentencing hearing, the appellant had a "pacemaker-defibrillator put in."

The appellant said he was born in Louisiana and also lived in Texas and Arkansas before moving to Tennessee to be closer to his sons and grandchildren. While in Tennessee, the appellant and his wife owned two residential lots in Sumner County and a mobile home was located on each lot. The appellant's residence was at 158 Riggs Road and the other lot, a rental property, was at 156 Riggs Road. The appellant acknowledged that when the probation officer who prepared his presentence report asked for his address to perform a requisite home visit, the appellant gave her the 156 Riggs Road address. The appellant asserted that the addresses are adjacent to each other. The appellant admitted that upon completing the interview portion of the presentence report, the probation officer cautioned him that "you need to come down to the probation office unless your attorney tells you otherwise." The officer said that the appellant "could not return to Florida and she said unless anybody tells you otherwise." The appellant maintained that, on the advice of counsel, he returned to Florida. The appellant admitted that he did not consult with the probation officer before leaving the state.

The appellant acknowledged that he had engaged in inappropriate sexual touching of the victims. The appellant reluctantly admitted that during the evaluation underlying his psychosexual report, he told the evaluator that he thought he was being "railroaded" because he had not done anything. He believed the victims were making accusations to sue him for money. However, the appellant admitted that he had not been sued over the incidents. The appellant conceded that the victims "haven't lied from beginning to end," but he stated that "there's been some mistruths in it." The appellant said that he did not know why he told A.D. that he would stop touching her butt.

At the conclusion of the sentencing hearing, the trial court stated that the appellant suffered obvious health problems. However, the court found that "given the circumstances of this case, given the fact of the position that he held, . . . incarceration is necessary for several reasons." The court found that the appellant needed to be punished. Additionally, the court was "concerned about deterrence" because of the rise in the occurrence of sexual crimes and the exploitation of children. The court said, "I have said from this bench many times and I believe it wholeheartedly, if the courts won't protect children, nobody will." The court ordered the appellant to serve six months in confinement with the remainder of his sentences to be served on probation. On appeal, the appellant challenges this ruling.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information

offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169. Further, we note that in sentencing regarding misdemeanor convictions, the "trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998).

On appeal, the appellant contends that "[c]onsidering all relevant factors, . . . statutorily he is entitled to probation." Thus, he argues "that it was error for the [trial court] not to place him on probation for these misdemeanor charges."

An appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). However, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." Id. at (b), Sentencing Commission Cmts. In the instant case, the appellant was sentenced for two Class A misdemeanors, and he received sentences of eleven months and twenty-nine days for each conviction. Generally, a trial court has the authority to place a misdemeanant on probation either after service of a portion of the sentence in confinement or immediately after sentencing. Tenn. Code Ann. § 40-35-302(e) (2003). While certain Class C, D, or E offenders are entitled to a presumption in favor of probation, a defendant is entitled to no such presumption regarding misdemeanor sentences. See Tenn. Code Ann. § 40-35-102(6); State v. Williams, 914 S.W.2d 940, 949 (Tenn. Crim. App. 1995). Our supreme court has observed that "[i]n addition to the statutory considerations for issuing sentences of confinement, the misdemeanor sentencing statute merely requires a trial judge to consider enhancement and mitigating factors when calculating the percentage of a misdemeanor sentence to be served in confinement." Troutman, 979 S.W.2d at 274. Accordingly, while the appellant was eligible for probation, he was not entitled to probation nor was he presumed to be a favorable candidate for probation.

The appellant argues that the trial court incorrectly denied probation. However, the trial court ordered the appellant to serve six months of his sentences in confinement with the remainder suspended, clearly a probationary sentence. Ergo, the appellant's true concern is the trial court's failure to grant full probation.

An appellant seeking full probation bears the burden of establishing suitability for full probation, regardless of whether he is entitled to the statutory presumption favoring alternative sentencing. State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996); see also Tenn. Code Ann. § 40-35-303(b) (2003). To prove suitability, the appellant must establish that granting full probation will "'subserve the ends of justice and the best interest of both the public and the

[appellant].'" State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), overruled on other grounds by State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). Moreover,

> [i]n determining one's suitability for full probation, the court may consider the circumstances of the offense, the [appellant's] potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes.

Boggs, 932 S.W.2d at 477.

We agree with the appellant that the trial court incorrectly considered deterrence in denying full probation. The trial court relied solely upon proof not in the record to determine that the appellant's confinement would have a deterrent effect on the appellant or the community. In Hooper, our supreme court cautioned that "[a]lthough we will not automatically preclude a judge from taking judicial notice of some facts necessary to establish a need for deterrence, particularly in the area of publicity, . . . remark[s] [which are] really nothing more than the result of the court's extrajudicial observations . . . should not be considered in sentencing." 29 S.W.3d at 13.

Regardless, we conclude that the record does not contain proof establishing the appellant's suitability for full probation. While certain factors, such as the appellant's health, work, and social history, are somewhat favorable to the grant of full probation, the record clearly reflects that the appellant repeatedly failed to accept responsibility for the offenses. Notably, the appellant attempted to blame the crimes on the victims, claiming that the victims' stories contained "mistruths" and were merely attempts to lay the groundwork for a lawsuit. Failure to accept responsibility is a germane consideration for determining rehabilitative potential. State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996). Accordingly, we conclude that the trial court did not err in refusing to grant full probation.

III. Conclusion

Finding no reversible error, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE